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May 24, 2002

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By Hand

Marlene H. Dortch, Secretary
Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

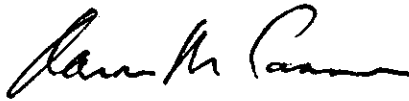
Re: *In the Matter of Pay Telephone Reclassification and Compensation Provisions of
the Telecommunications Act of 1996, CC Docket 96-128*

Dear Ms. Dortch:

Please find enclosed for filing the original and four copies of the RBOC Payphone Coalition's Comments on the Notice of Proposed Rulemaking Regarding Inmate Calling Services. Also enclosed is one extra copy of the motion. Please date-stamp and return the extra copy.

Thank you for your assistance. If you have any questions, please call me at 202-326-7921.

Sincerely,



Aaron M. Panner

Enclosures

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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MAY 24 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Pay Telephone
Reclassification and Compensation Provisions
of the Telecommunications Act of 1996

CC Docket No. 96-128

**RBOC PAYPHONE COALITION'S COMMENTS ON THE NOTICE OF
PROPOSED RULEMAKING REGARDING INMATE CALLING SERVICES**

INTRODUCTION AND SUMMARY

The RBOC Payphone Coalition¹ ("the Coalition") files these comments in response to the Commission's Notice of Proposed Rulemaking concerning inmate calling services.² The Notice initiates rulemaking to inmate calling services. Among the issues on which the Commission is taking comment are the costs and rates associated with provision of inmate calling services and various approaches that the States have taken in establishing inmate calling programs.

The Commission has proposed no specific rule with respect to inmate calling service rates, and the Coalition respectfully submits that the Commission should not adopt any. There is no basis for further regulation of the inmate calling services market. There is robust competition among inmate calling service providers, who compete to win the right to provide service in accordance with the policies established by corrections officials. If inmate calling service rates are high in some instances (and low in others),

¹ The RBOC Payphone Coalition comprises BellSouth Public Communications, Inc., SBC Communications Inc., and the Verizon telephone companies.

² See Order on Remand and Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd. 3248 (2002) ("NPRM").

this reflects conscious policy choices of state and local governments. Such decisions about how best to provide calling services to inmates – in light of security needs associated with inmate calling and other policy choices peculiar to inmate arrangements (including whether inmate calling should subsidize other services provided to inmates) – lie at the core of state police powers. The Commission cannot regulate inmate calling services without improperly intruding on state and local corrections policy.

The limited mandate in section 276 – to ensure that payphone service providers are adequately compensated for provision of service and to prevent subsidization of LEC-affiliated payphone service – cannot support Commission intervention into other aspects of inmate calling services. See 47 U.S.C. § 276. And, while the Commission has authority under sections 201 and 226 to ensure that *interstate* rates are just and reasonable, this provides no basis for regulating the rates charged for *intrastate* calls. See 47 U.S.C. §§ 201, 226. More fundamentally, there is vigorous competition to provide inmate calling services, and the marketplace, through the decisions of corrections officials, determines whether the rates charged for services are reasonable.

DISCUSSION

THE COMMISSION SHOULD NOT IMPOSE FURTHER REGULATION ON INMATE CALLING SERVICES AND SHOULD INSTEAD LEAVE THESE MATTERS TO CORRECTIONS OFFICIALS

A. **Competition-for-the-Contract Ensures That Corrections Officials Control the Rates for Inmate Calling Services; the Commission Should Not Intrude on This Core Police Power**

As the Commission has recognized in the past, the structure of the inmate calling services market is one in which inmate institutions themselves – not private inmate calling service providers – effectively determine the cost of inmate calling. Typically, inmate institutions award contracts to payphone or inmate service providers who offer the type of specialized equipment and services that corrections officials require. *See NPRM* ¶¶ 9-12. There is vibrant competition to win such contracts. *See Declaratory Ruling, Petition for a Declaratory Ruling by the Inmate Calling Service Providers Task Force*, 11 FCC Rcd 7362, 7373, ¶ 25 (1996) (“the record indicates that a *highly competitive prison payphone market* ensures the availability of prison payphone equipment”) (emphasis added). Such competition ensures that the Commission need not worry in general that payphone providers are being fairly compensated for calls from inmate institutions.³ If corrections institutions demand a commission that is so high as to deny the payphone provider any profit (which could happen either because their demand for commissions causes rates to be so high that inmates stop using the phones or because they demand too

³ There may be a few exceptions to this general rule. *See Illinois Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555, 566 (D.C. Cir. 1997) (holding that the failure to provide compensation to payphone providers for otherwise uncompensated coinless calls from inmate institutions during the interim period was “blatantly inconsistent with the language of the statute”).

high a percentage of a regulated rate), inmate calling service providers will simply refuse to bid to provide the service.

Just as significant, such competition ensures that corrections officials can effectively set the terms for inmate calling services in the process of awarding contracts to competing providers. *Cf. Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996) ("Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe."). The Commission has stated that such competition "perversely" may lead to higher rates for calls from inmate institutions, but there is nothing perverse about it: inmate institutions and state and local government officials may choose to maximize the commissions that the government can receive from inmate calling. On the other hand, officials may choose to offer a contract to the company that can offer the lowest rates to the recipients of inmate calls, or to cap such rates in the parties' agreement. As this Commission has noted, "prison authorities have considerable power to ensure that rates are just and reasonable by virtue of the monopoly contracts that they confer, [and] they also have the power and the incentive to contract with [operator services providers] that will give them the largest revenues from inmate phones." Second Report and Order and Order on Reconsideration, *Billed Party Preference for InterLATA 0+ Calls*, 13 FCC Rcd 6122, 6156, ¶ 58 (1998) ("*Second BPP Order*"). In either case, the responsible authorities have made a deliberate policy choice, one with which this Commission should not interfere.

To be sure, provision of inmate service is considerably more costly than provision of ordinary payphone service because of security concerns, so inmate calling rates are likely to remain much higher than rates for other telecommunications services. *See*

NPRM ¶ 9. But whether inmate institutions will require inmate service providers to recover their costs from callers, accept lower commission payment, or defray some portion of the provider's costs in order to keep rates as low as possible is, again, a choice that corrections officials can and do make based on security concerns, corrections policy, and other public policy considerations. State and local corrections officials should be permitted to balance those factors based on the characteristics of the inmate population and the institution. Such determinations – including a decision to seek a high commission on inmate calling services – are the legitimate exercise of the police power of the State. “States and public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government. They have to get revenue somehow, and the ‘somehow’ is not the business of the federal courts unless a specific federal right is infringed.” *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001).

No specific federal right is infringed, even when inmate calling rates are very high, because the States have legitimate authority to limit inmates' access to telephone service. An inmate “has no right to unlimited telephone use.” *Benzel v. Grammer*, 869 F.2d 1105, 1108 (8th Cir.), *cert. denied*, 493 U.S. 895 (1989). Instead, a prisoner's right to telephone access is “subject to rational limitations in the face of legitimate security interests of the penal institution.” *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986). “The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions.” *Fillmore v. Ordonez*, 829 F. Supp. 1544, 1563-64 (D. Kan. 1993), *aff'd*, 17 F.3d 1436 (10th Cir. 1994). Reasonable limits on inmate calls include permitting the cost

of inmate calls to reflect the inmate's confinement. *See Feigley v. Pennsylvania Pub. Util. Comm'n*, 794 A.2d 428, 431 (Pa. Comm. Ct. 2002) ("the lack of competitive alternatives in carriers is an unfortunate incident of incarceration").

In any event, while some inmate calling rates may be very high, corrections officials also face significant incentives to moderate inmate calling rates, both because of political activity by inmates' families and other advocates and because of concerns about keeping the peace inside inmate institutions. The Commission has noted that some corrections institutions use systems for debiting an inmate's account to provide inmate calling services rather than relying on collect calling. *See NPRM* ¶ 76; *see also Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994) (describing inmates calling services in the Federal Bureau of Prisons). The Commission obviously should do nothing to prevent more experimentation with different calling arrangements from continuing. But it is corrections officials, not this Commission, who should have the final say in choosing a service arrangement that best meets their needs.

B. The Commission Lacks Jurisdiction to Regulate Inmate Calling Rates, Even for Interstate Calls

Even if the Commission were inclined to adopt further regulations governing inmate calling services (and it should not), its jurisdictional authority to do so is sharply limited.

First, the Commission may not regulate the rates charged for intrastate calls, as that is within the jurisdiction of the States under section 2(b) of the Act. Intrastate calls make up the bulk of calls from state and local inmate institutions. *Second BPP Order*, ¶ 61. Section 276 does not change section 2(b) or provide such authority. As the Commission itself has noted, section 276 has two purposes: to prevent cross-subsidy of

LEC-affiliated payphones and to ensure that payphone providers receive fair compensation. *See* 47 U.S.C. § 276. Section 276 does not provide any mandate for the Commission to regulate the rates charged to inmate calling service users – to the contrary, the Commission has consistently moved *away* from regulating calling rates from payphones. *See, e.g.,* Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, 20570, ¶ 56 (1996) (deregulating the local coin rate to ensure “that the compensation for all local coin calls is fair”).

Nor do sections 201 and 226 provide authority to regulate rates charged by communications carriers and operator service providers for intrastate calls, as both of these provisions apply to *interstate* communications only. *See* 47 U.S.C. § 201 (setting forth duty to provide *interstate and foreign* communication services at “just and reasonable rates”); *id.* § 226 (defining operator services as “interstate telecommunications services”).⁴ As the Commission has observed in the past, these provisions simply provide no authority to regulate rates for intrastate calls.

Nor should the Commission use the limited jurisdiction it has over inmate services – as to the limited interstate calling – to interfere with arrangements dictated by State and local governmental correctional authorities. As explained above, the decision whether to set inmate calling rates at a high or low level is effectively controlled by corrections officials themselves. It is inconceivable that Congress would have intended

⁴ The Commission previously has exempted inmate calling services from section 226’s requirements because inmate calls present exceptional circumstances. *See NPRM* ¶ 71.

to authorize the Commission to interfere with that discretion, or to rule that a state-determined rate is "unjust and unreasonable" in these circumstances.

CONCLUSION

The Commission should refrain from further regulation of inmate calling services.

Respectfully submitted,



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